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In The

Supreme Court of the United States

October Term 1977

No. 76-1753

WALTER R. CONLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William D. Eggers
Michael R. Wolford
NIXON, HARGRAVE, DEVANS & DOYLE
Lincoln First Tower
Rochester, New York 14603

Counsel for Petitioner

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on March 17, 1977.

Opinion Below

The opinion of the Court of Appeals, reported at F.2d , is reproduced in the Appendix hereto. The order and judgment of conviction of the United States District Court for the Western District of New York is also reproduced in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 17, 1977. A timely motion for rehearing was denied in an Order dated May 10, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the presentation by the Government in its direct case of testimony by two F.B.I. agents that the defendant remained silent at the time of his arrest and in the wake of his *Miranda* warnings and requested counsel constituted a reversible error.

Statement of the Case

The defendant Walter R. Conlin was charged in a fifteen-count indictment by the Federal Grand Jury of the Western District of New York on October 10, 1974. The defendant was charged with thirteen counts of violating Title 26 of the United States Code, §7206(2) (preparing false and fraudulent tax returns for the years 1972 and 1973); one count in violation of Title 18, United States Code, §2071(a) (destroying Government records in possession of the Small Business Administration); and one count in violation of Title 18, United States Code, §1001 (submitting a false loan application to the Small Business Administration).

The jury trial of this matter commenced on March 24, 1976 and concluded on April 8, 1976, at which time the jury returned a verdict of guilty on ten of the fifteen counts charged in the indictment and the defendant was found not guilty on the remaining five counts. The defendant was sentenced by United States District Court Judge Harold P. Burke on May 10, 1976 to concurrent terms of two years each on the counts upon which he was found guilty. The Court suspended the execution of the

sentence, and placed the defendant on probation for a period of two years and imposed a fine totaling $5,000.00.

The defendant filed a notice of appeal on May 18, 1976 with the United States Court of Appeals for the Second Circuit, and on May 17, 1977 that Court affirmed the conviction. The petitioner filed a timely petition for rehearing with a suggestion for a rehearing in banc and in separate orders which were entered on May 10, 1977. The Court of Appeals denied the petition.

Reasons for Granting the Writ

POINT I

The Court of Appeals erred in concluding that the Government did not commit reversible error in introducing testimony of the defendant's silence at the time of his arrest and in the wake of his *Miranda* warnings.

The defendant Walter Conlin, who is a Public Accountant, was arrested by F.B.I. agents on January 18, 1974 at the Elmira, New York office of the Small Business Administration and charged with destroying Government records. This arrest was prompted by the defendant's seizure of copies of the income tax returns of Thomas Gill who Conlin had accompanied that morning to the SBA office.

In the Government's direct case, it initially presented testimony from Mr. James Cristofero of the SBA who met with Conlin and his client and who summoned the F.B.I. agents to the scene after Conlin refused to return copies of Gill's tax returns. On cross-examination of this witness,* defense counsel inquired as to what Conlin had stated to the witness when he refused to return the tax returns. The witness maintained that Conlin did not give an exculpatory statement, and no questions were asked of Cristofero regarding what Conlin had stated, if anything, to the F.B.I. agents.

Following Cristofero's testimony, the Government presented testimony from F.B.I. Agents Richard R. Rudy and Robert Bucher.** Both witnesses repeatedly referred in their direct examination to the *Miranda* warnings given to the defendant in

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*The pertinent direct and cross-examination of Mr. Cristofero is contained in the attached Appendix.

**The direct examination of Agents Rudy and Bucher is contained in the attached Appendix.

the SBA office, his refusal to answer their questions as well as his request that counsel be present. The defense attorney timely objected to the introduction of this testimony, and the objection was overruled.

In its opinion dated March 17, 1977, the Court of Appeals approved the introduction of this evidence and stated as follows at page 2379:

> "During the cross-examination of Mr. Cristofero, Conlin's counsel went squarely to the issue of what was said by Conlin to the witness or to the F.B.I., seeking an admission that Conlin had from the outset told Cristofero that he had brought the documents with him to the office that day and that he intended merely to leave with what he had brought. This was the version later testified to by Conlin himself."
>
> "When it became apparent that Conlin was adopting the position that he had spoken throughout the episode and had told both the SBA and F.B.I. officials that he had brought the documents with him on January 18, the U.S. Attorney brought out what he understood to be the facts . . ."
>
> "Appellant's contention concerning the making of exculpatory statements raised an issue which the Government was entitled to meet."

It is abundantly clear that the Court of Appeals erred in concluding that defense counsel's cross-examination of a previous witness served as the basis for the Government to introduce the otherwise inadmissible testimony.

A. *The legal principles enunciated by this Court preclude the introduction of the defendant's silence at the time of his arrest.*

Even before the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), it had become an established constitutional principle that a defendant's Fifth Amendment rights were

violated if the prosecution introduces evidence of his silence at the time of arrest or at a pre-trial proceeding or comments on the defendant's silence at the time of trial. *Bram v. United States*, 168 U.S. 532, 562 (1897), *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), *Wilson v. United States*, 149 U.S. 60 (1893) and *Griffin v. California*, 380 U.S. 609 (1965).

Furthermore, in *Grunewald v. United States*, 353 U.S. 391 (1955) the Court held that it was reversible error when a defendant was cross-examined at the time of trial regarding his silence at a previous Grand Jury proceeding. See also *Johnson v. United States*, 318 U.S. 189, 196-199 (1942).

With the issuance of the opinion in *Miranda v. Arizona*, *supra*, a new area of protected silence was established. The Court referred to this protected area when it stated at page 468 in footnote 24:

> "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

In *United States v. Hale*, 422 U.S. 71 (1975) this Court expanded the above principle and held that reversible error occurred when the defendant was cross-examined and forced to admit that he remained silent at the time of his arrest, even though he gave an exculpatory version in his direct testimony. The Court affirmed the reversal of the conviction not on constitutional grounds, but on its supervisory authority over Federal Courts. More recently, the Court in *Doyle v. Ohio*, 44 U.S.L.W. 4902, 49 L. Ed. 2d 91 (June 17, 1976), held that in a State Court trial the defendant was denied his Fourteenth Amendment right when the prosecution cross-examined him with respect to his silence at the time of his arrest.

Based upon the above, it is quite evident that the prosecution is prohibited from commenting on the defendant's silence at the time of trial by either introducing in its direct case evidence of the defendant's silence at the time of his arrest or at any pre-trial proceeding. Furthermore, the prosecution is prohibited from cross-examining the defendant who testifies on his own behalf and gives an exculpatory version of his conduct, although he remained silent at the time of his arrest.

B. *The exception noted in* Doyle v. Ohio, supra, *is not applicable to the instant case.*

The only justification for the introduction of a defendant's silence at the time of his arrest was referred to in *Doyle v. Ohio, supra*, wherein the Court stated in a footnote:

> "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon his arrest. In that situation, the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." (49 L.E.D. at p. 98).

This exception is consistent with the doctrine contained in *Harris v. New York*, 401 U.S. 222 (1971), wherein the Court held that a defendant's credibility may be impeached through the use of an otherwise inadmissible confession. In the instant matter, however, the defendant never testified before the Government introduced the silence testimony in its direct case, nor did defense counsel in his cross-examination elicit any exculpatory version of the event. Furthermore, the defense attorney's attempts to obtain from a previous witness an exculpatory statement made by the defendant was at a time and place prior to the arrest and before the F.B.I. agents had even arrived at the scene.

It is evident that in order for the *Doyle v. Ohio, supra*, exception to be applicable, it is first necessary to have the defendant present some testimony that he gave an exculpatory version at the time of his arrest.

The record is clear that the defendant introduced no testimony which would serve as a justification for introducing the inadmissible testimony of the F.B.I. agents.

The sole authority for the Court of Appeals ruling is the case of *United States v. Fairchild*, 505 F. 2d 1378 (5th Cir. 1975) wherein the defense attorney cross-examined an F.B.I. agent as follows:

> "During the period of time that this investigation has been going on, to your knowledge has Mr. Fairchild cooperated fully with the F.B.I. and the U.S. Attorney's Office in responding with anything that you all wanted?" (505 F. 2d at p. 1383).

Although the *Fairchild* opinion does not relate the answer, it implies that the agent was forced to admit that the defendant had cooperated. It is apparent that defense counsel's question opened Pandora's Box; and therefore, the Court concluded that the defendant had introduced evidence that the Government was entitled to rebut.

In the instant matter, however, the defense was not successful in obtaining any evidence from Mr. Cristofero that an exculpatory statement was made by the defendant prior to the arrival of the F.B.I. More importantly, the defense attorney never even attempted to elicit from the witness what the defendant had stated to the F.B.I. at the time of his arrest and following his *Miranda* warnings.

C. ***The harmless error rule would not apply to the instant matter.***

Although the Court of Appeals did not discuss the question of harmless error, it is evident that the error that occurred was not harmless. The Government in its brief on appeal asserts that the major issue on all accounts in the indictment was "credibility." (Government's brief, pp. 4, 6, 7). The Government also stated in its brief on appeal that:

> "The use by the prosecution of the defendant's silence after the *Miranda* warnings were given for purposes of impeaching the defendant's credibility regarding the false exculpatory statement . . . " (Government's brief, p. 13).

It is clear that since "credibility" was the major issue on all counts of the indictment, the inadmissible testimony was presented for the express purpose of affecting all counts of the indictment, and it is evident that it accomplished its intended purpose.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: June 6, 1977

Respectfully submitted,

William D. Eggers
Michael R. Wolford
NIXON, HARGRAVE, DEVANS & DOYLE
Lincoln First Tower
Rochester, New York 14603

Counsel for Petitioner